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IN THE

Supreme Court of the United States.

OCTOBER TERM 1978.

No. 77-1842.

RUTH A. HAGAN, MARILYN B. DOW,
MARY LOU PATTISON
AND
JOHN CURTIS, M.D.,
PETITIONERS
v.
GEORGIA MAE DOWNS,
RESPONDENT

Brief of Georgia Mae Downs in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

STEPHEN D. CLAPP
DOUGLAS A. CLAPP
MICHAEL J. CUNNIFF
ARMSTRONG, POLLIS AND CLAPP
52 North Washington Street
North Attleborough, Massachusetts 02760
Attorneys for Respondent

Addison C. Getchell, Law Printers, Boston.

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Argument.

1. THE PETITIONERS HAVE PRESENTED A DISTORTED PICTURE OF THE FACTS UPON WHICH THE QUESTIONS REST.

The Petitioners do not claim that the court of appeals applied the wrong standard for reviewing the district court's grant of a directed verdict. The standard applied was whether the evidence, viewed in the light most favorable to the Respondent, is such that fair-minded men may

draw different inferences therefrom and reasonably disagree as to what the verdict should be (Cert. App. 31). A comparison of the Petitioner's statement of facts (Cert. Pet. 3) with that of the court of appeals (Cert. App. 15) shows that the Petitioners have erroneously presented the evidence viewed in the light most favorable to themselves. In some instances, the Petitioners have stated facts which are wholly absent from the record to be considered on directed verdict.

In the very first sentence of their factual presentation, the Petitioners state that the Respondent had received social services from the Maine Department of Health and Welfare during her first pregnancy in 1971 (Cert. Pet. 3-4). There is nothing in any exhibit, trial transcript or pleading which supports this statement. Likewise, there is nothing in the record to be considered on directed verdict which would support the statement that during the first pregnancy Petitioner Dow communicated with the Respondent through Roberta Sawtelle (Cert. Pet. 4); or that the Respondent was housed, fed, and generally looked after by Roberta Sawtelle (Cert. Pet. 4); or that the probate court requested Dow to prepare a report regarding guardianship (Cert. Pet. 5); or that Pattison had discussions with Roberta Sawtelle regarding the Respondent's unborn child (Cert. Pet. 6).

The factual setting dealt with by the court of appeals is distorted by the Petitioner's presentation of facts in the light most favorable to themselves. It is inaccurate to state that Roberta Sawtelle was able to communicate with the Respondent in sign language (Cert. Pet. 4). The Respondent testified that she was able to understand Roberta Sawtelle's signs only a little and Mrs. Dow admitted that she was never completely sure that the Respondent understood what Roberta Sawtelle was saying

to her. It is misleading to state as a fact that Davis Goodine contacted the Department of Health and Welfare to request assistance with a sterilization of the Respondent (Cert. Pet. 4) when, as the court of appeals pointed out, there was conflicting evidence as to the origin of the idea to have the Respondent sterilized and that there was evidence that the agency initiated the idea (Cert. App. 16).

The Petitioners state that Petitioner Dow recommended to Davis Goodine that he apply for guardianship over the Respondent in order to gain control over her (Cert. Pet. 4). However, the recommendation actually was that he apply for guardianship over the Respondent in order to gain control over her in order that she might be sterilized. The statement that Dow discussed guardianship with the Respondent (Cert. Pet. 5) is misleading since the record contains an admission by Dow that she never inquired as to whether the Respondent wanted anyone to be her guardian.

Although the Petitioners state that an attorney represented the Respondent at the probate hearing (Cert. Pet. 5) the only thing in the record on the subject is Dow's statement that John Easton, Roberta Sawtelle's attorney in this case, was with Roberta Sawtelle and the Respondent and that she did not recall ever being told by anyone that he was representing the Respondent.

The Petitioners state that although Dr. Curtis was convinced that the Respondent was in agreement with the sterilization, the Respondent testified that she did not consent (Cert. Pet. 5). Not only did she not consent, she testified that she told Dr. Curtis that she did not want the operation and she wrote him a letter telling him that she wanted additional children. They also state that the sterilization was performed in part upon what Dr. Curtis

perceived and believed to be the Respondent's consent (Cert. Pet. 6). As the court of appeals pointed out, the evidence most favorable to the Respondent admits of the conclusion that Dr. Curtis deliberately ignored repeated indications from the Respondent and her fiance that they did not want the operation to take place (Cert. App. 32).

The Petitioners state that the child was placed by the social workers in a foster home on the strength of the guardian's signature 9 days before the judicial commitment procedure was instituted (Cert. Pet. 6). This statement is incomplete without including the facts that Pattison believed that the Attorney General had stated that the only way the baby could be taken into care was through a judicial commitment procedure and that the first judicial order authorizing the agency to have care of the baby was issued 27 days after they took him into care. They state that the Respondent did not express any concern or objection that her child had been placed in a foster home (Cert. Pet. 6). However, the Respondent was not permitted to see her child after its birth, despite her requests to do so (Cert. App. 19). They state that the Respondent indicated to the Maine District Court that she had no objection to the baby being placed in state custody (Cert. Pet. 7). However, the evidence most favorable to the Respondent is that, even though she was unrepresented by counsel and had no impartial interpreter, she told the judge that she wanted her baby.

The Petitioners state that the social workers believed that the Respondent's marriage to Downs might have unnecessarily delayed the judicial commitment (Cert. Pet. 7). They make this statement apparently to justify their efforts in delaying the marriage. The record, however, shows that they decided to delay the marriage long before they even contemplated the commitment proceedings.

The court of appeals found that the evidence most favorable to the Respondent was that Dow and Sawtelle were aware that the existence of a husband could impede efforts to have the child adopted and agreed that Sawtelle would persuade the Respondent that Sawtelle's consent to the marriage was required and that Sawtelle would withhold the consent until after the baby's birth (Cert. App. 16). Without any support in the record, the Petitioners now state that their decision to delay the marriage was based in part on a statement by Mr. Downs that he did not want the child (Cert. Pet. 7). The court of appeals found that Downs did want the child and wanted it to bear his name (Cert. App. 16).

The Petitioners assert that there was no evidence to indicate that the social workers were aware that the Respondent was opposed to the sterilization (Cert. Pet. 5). On the contrary, the evidence permits the inference that the social workers knew that the Respondent was not in favor of the sterilization. They would not have had to deceive the Respondent into delaying her marriage (Cert. App. 16) if they had thought she was in favor of the sterilization. There would have been no need for the social workers to recommend guardianship for the purpose of sterilization had they believed she would consent voluntarily. There was also evidence that although the social workers learned from the Maine Attorney General that the Respondent's signature would be sufficient to surrender her child to them, the social workers elected not to ask her to sign, but to take the child without her signature and to later institute state court action to obtain

legal custody of the child. An inference that the social workers knew that the Respondent would not consent to the surrender can be drawn. Their knowledge of the Respondent's opposition in this instance also tends to show their knowledge of the Respondent's opposition in general.

The Petitioners argue that a review of the record by the Court will fail to disclose any inference of malice attributable to any of the Petitioners (Cert. Pet. 13). They seem to overlook the court of appeals' detailed analysis of the evidence concerning Dr. Curtis' conduct (Cert. App. 16-18) and the conclusion by the court of appeals that a permissible inference which could be drawn from that conduct was malice and a lack of good faith (Cert. App. 31-33).

The Petitioners' statement of facts cannot be relied upon in evaluating the questions presented. Their failure to recognize that the evidence must be considered in the light most favorable to the Respondent assures that, if the Court grants certiorari, the "questions presented" will not be reached due to the presence in the record of facts and inferences conflicting with those stated by the Petitioners.

2. The Opinion Below Is in Accordance with Decisions of the Court Regarding the Availability of Qualified Immunity to Public Officials Sued under 42 U.S.C. § 1983.

The court of appeals held that the district court erred in assuming that the defendant social workers were entitled to rely upon the defense of good faith immunity available to certain public officials in causes of action asserted under 42 U.S.C. § 1983. The issue was remanded to the district court to provide an opportunity for the defendants to develop the relevant factual data and legal principles upon which the district court could properly base a decision.

In so holding, the court of appeals relied on a series of the Court's decisions spanning the past decade which have addressed the immunity of certain state officials when sued under § 1983. See *Procunier v. Navarette,* 46 U.S.L.W. 4144 (February 22, 1978) (prison officials); *Imbler v. Pachtman,* 424 U.S. 409 (1976) (prosecutors); *O'Connor v. Donaldson,* 422 U.S. 563 (1975) (superintendent of state hospitals); *Wood v. Strickland,* 420 U.S. 308 (1975) (school board members); *Scheuer v. Rhodes,* 416 U.S. 232 (1974) (state governor, president of state university, officers of state national guard); *Pierson v. Ray,* 386 U.S. 547 (1967) (judges and police officers). In some cases, the Court determined that the types of state officials involved were entitled to absolute immunity from § 1983 damage liability for acts performed in their official capacities. See *Imbler v. Pachtman, supra,* and *Pierson v. Ray, supra,* while in other cases the Court found only a qualified immunity which shields certain state officials from damage liability for official actions shown to have been taken in good faith. Since there is no language in § 1983 which extends any immunity to state officials, the Court's decisions on § 1983 immunities "were not products of judicial fiat," but rather were based upon "a considered inquiry into the immunity historically accorded the particular official at common law and the interests behind it," *Imbler v. Pachtman, supra,* at 421. In addition to an analysis of relevant common law principles, the Court has also recognized the need to examine the public policy considerations involved in affording a qualified immunity to "public officers charged with a considerable range of responsibility and discretion," *Wood v. Strickland, supra,* at 317-18.

Such public policy considerations include (1) the injustice, absent bad faith, of subjecting an official to liability who is required to exercise discretion in the performance of his or her duties and (2) the danger that the threat of such liability would deter the necessary decisiveness and judgment of such official to the overall detriment of the public good. See *Scheuer v. Rhodes, supra,* at 240.

The Court has never determined that the qualified immunity available to certain state officials extends to social workers. The court of appeals was entirely correct, therefore, in remanding this issue to the district court to be determined in accordance with the carefully delineated principles of § 1983 immunities previously set forth by the Court. Only through a "considered inquiry" into the relevant common law principles and public policy considerations involved, can a reasoned determination be made as to what type of, if any, qualified immunity the social workers will be entitled to assert. This determination first and foremost requires an initial factual development at the district court level as to the nature of the positions involved and the range of responsibilities required to be exercised by such officials. Contrary to the Petitioners' assertions, such factual developments are not as yet revealed by the record in this case.

The social worker Petitioners contend that the court of appeals erred in remanding to the district court. Based on the Court's decisions in *Procunier v. Navarette, supra,* and *O'Connor v. Donaldson, supra,* the Petitioners assert that the Court has abandoned the requirement of a "considered inquiry" into the relevant common law and public policy considerations so carefully enunciated in *Imbler, Wood,* and *Scheuer,* and has now extended an automatic qualified immunity to every public official sued under § 1983. Upon examination, this assertion is patently without merit.

In *O'Connor v. Donaldson, supra,* a case involving the liability of a superintendent of a state hospital, the Court remanded the case to enable the court of appeals to consider, in light of *Wood,* whether the district judge's failure to instruct the jury with regard to the effect of O'Connor's claimed reliance on state law was reversible error. The availability of a qualified immunity for O'Connor was not at issue in the case since the district judge had already instructed the jury, without objection, that O'Connor was entitled to a good faith defense.

After *O'Connor,* the Court in *Imbler v. Pachtman, supra,* reiterated the necessity of a reasoned analysis or "considered inquiry" in determining the availability or scope of § 1983 immunities available to public officials. In *Procunier v. Navarette, supra,* at 4146 n. 7, the Court adopted without further discussion, the reasoned analysis already undertaken by a number of courts of appeals, that prison and jail administrators performing discretionary functions were entitled to a qualified immunity.

Any doubts as to the continuing viability of the "considered inquiry" requirement are resolved by the most recent pronouncement of the Court on the issue in *Butz v. Economou,* 46 U.S. L.W. 4952 (June 29, 1978). While that case involved an examination of the immunities to which certain federal officials were entitled in claims for damages arising from alleged violations of constitutional rights, the analysis involved was based on the identical considerations required in cases regarding the immunities of state officials. The Court reviewed the principles laid down in previous cases and undertook an examination of both the common law and public policy considerations involved.

Nothing less than such a "considered inquiry" at the district court level is required here, where the issue of

to what degree of immunity, if any, the Petitioner social workers are entitled is one which lacks both prior judicial analysis and prior factual development as to the nature of the positions involved.

3. THE PETITIONERS ARE NOT ENTITLED TO IMMUNITY AS A MATTER OF LAW BECAUSE THEY ARE UNABLE TO SHOW THAT BOTH THE OBJECTIVE AND SUBJECTIVE COMPONENTS OF THE TEST FOR QUALIFIED IMMUNITY HAVE BEEN CONCLUSIVELY SATISFIED.

The Court has held in *Wood v. Strickland, supra,* that public officials are immune from damage liability under § 1983 for their official actions taken in good faith. Their immunity is qualified by the good faith requirement. The requisite good faith will not be found to exist if the public official knew or reasonably should have known that his official action would violate the constitutional rights of the plaintiff. In addition, good faith will not be found to exist if the public official acted with malicious intent.

The district court ruled that the deprivation of a person's ability to bear children, or of a person's right to raise children or of a person's right to marry are deprivations of constitutional rights which the state cannot accomplish without due process of law (Cert. App. 6). The court of appeals held that a member of the medical profession reasonably should be aware that irrevocably terminating a patient's ability to bear children without her consent is a deprivation of a fundamental constitutional right (Cert. App. 30).

The Petitioners argue that the authority of a guardian to supply consent to the involuntary sterilization of her ward was unsettled at the time of their actions and that this uncertainty brings them clear of the objective portion of the *Wood* test. If there had been no guardian there

would have been no uncertainty. Mrs. Dow initiated the idea of guardianship by recommending it to Davis Goodine for the express purpose of sterilizing the Respondent. Now, after the guardian has been brought into the picture at their recommendation, the social workers cannot complain that the guardian's presence adds uncertainty of the sort which would cause their acts to be deemed in good faith.

Dr. Curtis, recognizing his ignorance concerning the authority of a guardian to supply consent, called the social workers to find out who could consent and was told to call the local probate judge (Cert. App. 18). Dr. Curtis elected to avoid the risk of discouragement by not calling the judge. He performed the operation on the consent of the guardian in the face of his recognized ignorance. As the court of appeals ruled, "reasonable men could come to the conclusion that the doctor did not act in good faith" (Cert. App. 33).

Moreover, the law in Maine at the time of the acts in question was not unsettled. Maine, like several other states, had a eugenic sterilization statute which provided for the involuntary sterilization of certain people upon the consent of a guardian. 34 Me. Rev. Stat. Ann. § 2461 (see Appendix to this Brief, pp. 17-18). The Maine statute provides that sterilization operations upon the consent of a guardian shall be lawful if the statute's conditions and restrictions are met. Among its conditions and restrictions are the requirements that the subject must be feeble-minded, and mentally incapable of giving his own consent. Milo Community Hospital relies upon compliance with this statute as an affirmative defense raised in its answer. However, the other defendants, after Dr. Curtis admitted that the Respondent was not fleeble-minded and was capable of giving her own consent, stipulated that the Maine statute

was not followed. The Petitioners suggest that the authority of a guardian to consent to an involuntary sterilazation was unclear, but they do not explain how this is so in the face of a statute which legalizes such a procedure only if the statute's terms are complied with.

The Petitioners in their argument do not deal with the possibility that the social workers and the doctor could be found to have acted maliciously. According to the *Wood* test, good faith can be dissolved either by the objective reason to know better or by the subjective malicious intent. The court of appeals, in evaluating the evidence most favorable to the Respondent concluded that the evidence supports an inference of malice on the part of Dr. Curtis (Cert. App. 32). Although the court of appeals did not find it necessary to rule directly on the Respondent's proof of the social worker's bad faith, it did note "that our review of the record indicates that her claims against the social workers should be resolved by the jury" (Cert. App. 36).

4. The Court of Appeals Correctly Ruled that Dr. Curtis Was a State Actor due to His Relationship to the Milo Community Hospital.

The Petitioner Curtis asserts that the court of appeals was in error in ruling that he was a state actor on the basis of his association with Milo Community Hospital for two reasons. The first reason claimed is that his position as chief of staff had no relationship with the Respondent's § 1983 claim. The second reason claimed seems to be that the court of appeals was unable to find a "nexus" between the state and the hospital as to the conduct complained of.

Dr. Curtis' duties as chief of staff included carefully supervising the clinical work of the hospital. The respon-

sibility for the operation and maintenance of the hospital and the evaluation of hospital practices was a joint effort by the trustees, the administrator and the chief of staff (Cert. App. 26). The record indicated that the hospital had a regulation which permitted sterilization in any of six circumstances and that only one of them, mental retardation, could even arguably have applied to the Respondent. Dr. Curtis did not consider the Respondent retarded, but yet he wrote in the hospital medical record that he recommended sterilization " 'based 90% on this girl's low mentality involving poor judgment and her lack of restraint on sex appetite and its consequences' " (Cert. App. 17). Dr. Curtis also permitted the operation to go forward in violation of another hospital policy which required the patient's own signature on a standardized sterilization consent form. Although the Respondent could have understood the form and had signed other minor forms, her signature was not obtained (Cert. App. 18).

The only reason the clinical work of Dr. Curtis, the private physician, was not carefully supervised by a third party chief of staff was because Dr. Curtis was also the chief of staff. Dr. Curtis', the private physician's, violations of the hospital's sterilization regulations were allowed to harm the Respondent only because of the collusion of Dr. Curtis, the chief of staff.

Not only was the court of appeals correct in its analysis of the state action aspects of the hospital in relation to the *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) symbiotic relationship test which was reaffirmed by *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), but a nexus, in the *Jackson* sense, also exists. The court of appeals recognized the possibility that the symbiotic relationship between the town and the hospital could produce a nexus due to the fact that the town paid

the expenses of the sterilization. The court of appeals was unclear as to:

> "how much, if any, discretion was exercised by the town in determining to make the payment. If not all indigents' hospitals bills were paid by the town as a matter of course and if plaintiff's bill was paid as a matter of discretionary judgment, such facts would point to a nexus between the town and the hospital as to the specific conduct complained of" (Cert. App. 25-26).

If the town had any obligation to pay for medical services for the Respondent, such an obligation could only have resulted from its duty to relieve poverty. In 1972 and 1973 the town's obligation to its poor was administered by overseers. 22 Me. Rev. Stat. Ann. § 4459 provided that:

> "Overseers shall have the care of all paupers or persons dependent upon the town for their support residing in their town and cause them to be relieved and employed at the expense of the town. . . . "

Case law construing the overseers' powers and duties has consistently held that overseers act with discretion in determining the necessity of, the nature of, and the extent of any relief to be furnished to indigents, *Inhabitants of Fort Fairfield v. Inhabitants of Millinocket,* 136 Me. 426, 12 A. 2d 173 (1940).

In making the decision to pay the Respondent's hospital bill and her bill from Dr. Curtis for the sterilization, the town exercised broad discretion. It could have declined to pay the bills due to the nature of the charges, or due to the amount of the charges, or due to the Respondent's lack of need for the services. The exercise of its discretion in paying the Respondent's bills points to a nexus between the town and the complained of activity.

Conclusion.

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

STEPHEN D. CLAPP
DOUGLAS A. CLAPP
MICHAEL J. CUNNIFF
ARMSTRONG, POLLIS AND CLAPP
52 North Washington Street
North Attleborough, Massachusetts 02760
Attorneys for Respondent

Appendix.

22 Me. Rev. Stat. Ann.

§ 4459. Overseers' duties; employment of paupers or dependent persons

Overseers shall have the care of all paupers or persons dependent upon the town for their support residing in their town and cause them to be relieved and employed at the expense of the town. The town may direct their employment, whether said pauper or other dependent person has a settlement in their town or not. Nothing contained herein shall in any way diminish the liability of the town of settlement or of the State with respect to the reimbursement to the town of residence for supplies furnished to such pauper or dependent person. Overseers of the poor and all other officers having charge of the administration of pauper funds shall keep full and accurate records of the paupers fully supported, the persons relieved and partially supported and the travelers and vagrants lodged at the expense of their respective towns, together with the amount paid by them for such support and relief; and shall annually make return of the number of such persons supported and relieved, with the cost, to the Department of Health and Welfare. Any person who refuses without lawful excuse to perform the employment directed by the town shall be punished by a fine of not more than $20 or by imprisonment for not more than 90 days for each offense, or by both.

R.S.1954, c. 94, § 12.

34 Me. Rev. Stat. Ann.

§ 2461. Consent necessary; procedure prior to operation

The operation of vasectomy and fallectomy may be performed under the conditions and within the restrictions described and under such provisions shall be lawful.

When either of the recognized sterilizing operations referred to may be indicated for the prevention of the reproduction of further feeble-mindedness, or for the therapeutic treatment of certain forms of mental disease, physicians may recommend to the nearest relative, guardian and affected individual the advisability and necessity of such operation. When the written consent of the patient, when mentally competent to give such consent or the written consent of the nearest relative or guardian when the patient is mentally incompetent to give such consent, is given, the physician shall call a council of 2 registered medical practitioners, one a physician and one a surgeon, of not less than 5 years' practice and not related to the patient, whose duty it shall be in conjunction with the physician in charge of the case, to examine the individual recommended for operation. Whether the person to be operated upon is mentally capable of giving his consent shall be decided by the consultants and stated in writing, with their reasons therefor, and such written statement shall be kept on file at the Pineland Hospital and Training Center and in case they find that the patient is mentally incapable of giving his consent, the consent of the nearest relative or guardian must be secured. If in the judgment of the consulting physicians the operation will prevent the further propagation of mental deficiency, or if in the judgment of the medical consultants the physical or mental condition of any such person will be substantially benefited thereby, then the consultants shall select a competent surgeon to perform the operation of fallectomy or vasectomy, as the case may be, upon such person, and such surgeon may be the consulting surgeon.

R.S.1954, c. 27, § 149; 1957, c. 21, § 2.

see

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